



5001-06-P

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211, 215, 219, 242, and 252

[Docket DARS-2016-0027]

RIN 0750-AJ00

**Defense Federal Acquisition Regulation Supplement: Temporary
Extension of Test Program for Comprehensive Small Business
Subcontracting Plans (DFARS Case 2015-D013)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections of the National Defense Authorization Acts for Fiscal Years 2015, 2016, and 2017 to provide revisions to the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Ms. Jennifer Johnson, telephone 571-372-6100.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published a proposed rule in the Federal Register at 81 FR 65606 on September 23, 2016, to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291) and section 872 of the NDAA for FY 2016 (Pub. L. 114-92), to revise the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans ("the Test Program").

Section 821 of the NDAA for FY 2015 provides for contractors participating in the Test Program to report, on a semiannual basis, specific information related to their comprehensive subcontracting plans. This information is expected to assist in determining if Test Program participants have achieved cost savings while enhancing opportunities for small businesses.

In addition, section 821—

- Repeals section 402 of Public Law 101-574, which suspended liquidated damages under comprehensive small business subcontracting plans;
- Requires consideration, as part of the past performance evaluation of an offeror, of any failure to make a good faith effort to comply with its comprehensive subcontracting plan;
- Extends the Test Program from December 14, 2014, through December 31, 2017;

- Increases the threshold for participation in the Test Program from \$5 million to \$100 million; and
- Prohibits negotiation of comprehensive subcontracting plans with contractors who failed to meet the subcontracting goals of their comprehensive subcontracting plan for the prior fiscal year.

Section 872 of the NDAA for FY 2016 removes the prohibition on negotiation of comprehensive subcontracting plans with contractors who failed to meet the subcontracting goals of their comprehensive subcontracting plan for the prior fiscal year.

This final rule also implements section 826 of the NDAA for FY 2017 (Pub. L. 114-328), which further extends the Test Program through December 31, 2027.

II. Discussion and Analysis

One respondent submitted a public comment in response to the proposed rule. DoD reviewed the public comment in the development of the final rule.

A. Summary of Significant Changes From the Proposed Rule

There are no changes made to the final rule as a result of the public comment; however, other conforming changes are made.

B. Analysis of Public Comment

Comment: The respondent urged DoD to state in its regulations that any civilian injured through exposure to toxic substances

at a military installation would be considered a service-disabled veteran for purposes of eligibility for DoD programs.

Response: The comment is outside the scope of this case.

C. Other Changes from the Proposed Rule

The text at DFARS 219.702-70(f) is revised to reflect the expiration date for the Test Program of December 31, 2027, to implement section 826 of the NDAA for FY 2017. References in DFARS clause 252.219-7004 to the "Data Universal Numbering System (DUNS) number" are revised to read "unique entity identifier". Paragraph headers are added at DFARS 219.702-70(a) and 252.219-7004(b) and (e).

III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items

This rule applies the requirements of section 821 of the NDAA for FY 2015 to contracts for the acquisition of commercial items, including commercially available off-the-shelf (COTS) items. The rule is not applicable to the contracts at or below the simplified acquisition threshold. Accordingly, the Director, DPAP, has signed a determination and finding to apply this rule to contracts for the acquisition of commercial items, including COTS items, for DFARS clauses 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), and 252.219-7004, Small Business Subcontracting Plan (Test Program).

IV. Expected Cost Savings

This final rule amends the DFARS to implement section 821 of the NDAA for FY 2015, section 872 of the NDAA for FY 2016, and section 826 of NDAA for FY 2017, all of which provide revisions to the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans. Section 826 extended the Test Program through December 31, 2027.

Customarily, an individual small business subcontracting plan is required to be negotiated by large business firms for each contract above \$700,000. Under the Test Program, participants negotiate a comprehensive subcontracting plan (CSP) to cover all applicable contacts, in lieu of providing a separate plan for each individual contract. To be eligible for the Test Program, the program participants are required to be accepted into the program and to have at least three DoD contracts during the preceding year with an aggregate value of at least \$100 million. There are currently nine large business firms that are currently participating in the Test Program. The CSPs for these nine large businesses cover approximately 8,000 contracts.

This rule revises DFARS clause 252.219-7004, Small Business Subcontracting Plan (Test Program), to require the nine Test Program participants to report, on a semiannual basis, specific information related to their CSPs. This information is expected to assist DoD in determining if the participants have achieved

cost savings while enhancing opportunities for small businesses. Contracting officers conduct compliance reviews each year; and, if it is determined that the contractor failed to make a good faith effort to comply with the CSPs, the contracting officer may assess liquidated damages. Any failure to meet negotiated goals will also be considered as part of the evaluation of the participant firm's past performance. However, very few, if any, failures are expected in the Test Program.

Over the next 10 years, significant cost savings are expected to accrue to the public and the Government through use of CSPs by greatly reducing administrative burdens, while also advancing the interests of small business subcontractors. Use of CSPs may also foster an environment that provides visibility to a firm of its overall subcontracting program, thereby potentially providing greater opportunities to ensure equitable consideration on an enterprise-wide basis for business opportunities for all its subcontractors.

DoD has performed a regulatory cost analysis on this rule. The following is a summary of the estimated public annualized cost savings in millions, calculated in 2016 dollars at a 7-percent discount rate in perpetuity:

Annualized at 7%:	\$2.1
Present Value at 7%:	\$29.8

To access the full Regulatory Cost Analysis for this rule, go to the Federal eRulemaking Portal at www.regulations.gov, search for "DFARS Case 2015-D013," click "Open Docket," and view "Supporting Documents."

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. The Office of Management and Budget, Office of Information and Regulatory Affairs, has determined that this is not a significant regulatory action as defined under section 3(f) of E.O. 12866 and, therefore, was not subject to review under section 6(b). This rule is not a major rule under 5 U.S.C. 804(2).

VI. Executive Order 13771

This final rule is considered to be an E.O. 13771 deregulatory action. Details on the estimated cost savings can be found in section IV. of this preamble.

VII. Regulatory Flexibility Act

A final regulatory flexibility analysis (FRFA) has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. The FRFA is summarized as follows:

DoD is issuing a final rule to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement section 821 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2015 (Pub. L. 113-291), section 872 of the NDAA for FY 2016 (Pub. L. 114-92), and section 826 of the NDAA for FY 2017 (Pub. L. 114-328). Section 821 of the NDAA for FY 2015 provides several changes to the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans (Test Program), including new reporting and eligibility requirements, an extension of the Test Program, and authority to assess liquidated damages. Section 872 of the NDAA for FY 2016 removes one of the eligibility requirements. Section 826 of the NDAA for FY 2017 extends the Test Program through December 31, 2027. The objectives of this rule are to collect data to assist in assessing the successes or shortcomings of the Test Program and to provide the means to hold Test Program participants accountable for failure to make a good faith effort to comply with their comprehensive subcontracting plans.

There were no issues raised by the public in response to the initial regulatory flexibility analysis provided in the proposed rule.

The rule will not apply to small entities. Therefore, the rule does not impose any reporting or recordkeeping requirements on any small entities.

DoD has not identified any alternatives that are consistent with the stated objectives of the applicable statutes. However, DoD notes that the rule may have a positive economic impact on small entities because the rule encourages Test Program participants to make a good faith effort to comply with their comprehensive subcontracting plans.

VIII. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35), because the rule does not impose a collection of information on ten or more members of the public.

List of Subjects in 48 CFR Parts 211, 215, 219, 242, and 252

Government procurement.

Jennifer Lee Hawes,

Regulatory Control Officer,

Defense Acquisition Regulations System.

Therefore, 48 CFR parts 211, 215, 219, 242, and 252 are amended as follows:

1. The authority citation for parts 211, 215, 219, 242, and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 211—DESCRIBING AGENCY NEEDS

2. Add section 211.500 to subpart 211.5 to read as follows:

211.500 Scope.

This subpart and FAR subpart 11.5 do not apply to liquidated damages for comprehensive subcontracting plans under the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans. See 219.702-70 for coverage of liquidated damages for comprehensive subcontracting plans.

PART 215—CONTRACTING BY NEGOTIATION

3. Amend section 215.305(a)(2) by—

- a. Designating the text as paragraph (a)(2)(A); and
- b. Adding paragraph (a)(2)(B).

The addition reads as follows:

215.305 Proposal evaluation.

(a)(2) * * *

(B) Contracting officers shall consider an offeror's failure to make a good faith effort to comply with its comprehensive subcontracting plan under the Test Program described at 219.702-70 as part of the evaluation of the past performance.

PART 219—SMALL BUSINESS PROGRAMS

219.702 [Redesignated as 219.702-70]

4. Redesignate section 219.702 as 219.702-70; and revise it to read as follows:

219.702-70 Statutory requirements for the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans.

(a) Test Program. In accordance with 15 U.S.C. 637 note, DoD has established a test program to determine whether comprehensive subcontracting plans on a corporate, division, or plant-wide basis will reduce administrative burdens while enhancing subcontracting opportunities for small and small disadvantaged business concerns. This program is referred to as the Test Program for Negotiation of Comprehensive Small Business Subcontracting Plans (Test Program).

(b) Eligibility requirements. To become and remain eligible to participate in the Test Program, a business concern is required to have furnished supplies or services (including construction) under at least three DoD contracts during the preceding fiscal year, having an aggregate value of at least \$100 million.

(c) Comprehensive subcontracting plans. (1) The Defense Contract Management Agency will designate the contracting officer who shall negotiate and approve comprehensive subcontracting plans with eligible participants on an annual basis.

(2) Test Program participants use their comprehensive subcontracting plans, in lieu of individual subcontracting plans, when performing any DoD contract or subcontract that requires a subcontracting plan.

(d) Assessment. The contracting officer designated to manage the comprehensive subcontracting plan shall conduct a compliance review during the fiscal year after the close of the fiscal year for which the plan is applicable. The contracting officer shall compare the approved percentage or dollar goals to the total, actual subcontracting dollars covered by the comprehensive subcontracting plan.

(1) If the contractor has failed to meet its approved subcontracting goal(s), the contracting officer shall give the contractor written notice specifying the failure, advising of the potential for assessment of liquidated damages, permitting the contractor to demonstrate what good faith efforts have been made, and providing a period of 15 working days (or longer period at the contracting officer's discretion) within which to respond. The contracting officer may take the contractor's failure to respond to the notice as an admission that no valid explanation exists.

(2) The contracting officer shall review all available information to determine whether the contractor has failed to make a good faith effort to comply with the plan.

(3) If, after consideration of all relevant information, the contracting officer determines that the contractor failed to make a good faith effort to comply with the comprehensive subcontracting plan, the contracting officer shall issue a final decision. The contracting officer's final decision shall include the right of the

contractor to appeal under the Disputes clause. The contracting officer shall distribute a copy of the final decision to all cognizant contracting officers for the contracts covered under the plan.

(e) Liquidated damages. The amount of liquidated damages shall be the amount of anticipated damages sustained by the Government, including but not limited to additional expenses of administration, reporting, and contract monitoring, and shall be identified in the comprehensive subcontracting plan. Liquidated damages shall be in addition to any other remedies the Government may have.

(f) Expiration date. The Test Program expires on December 31, 2017.

5. Amend section 219.708 by—

- a. Revising paragraph (b) (1) (B);
- b. Revising paragraph (b) (2); and
- c. Removing from paragraph (c) (1) "test program described in 219.702" and adding "Test Program described in 219.702-70" in its place.

The revisions read as follows:

219.708 Contract clauses.

(b) (1) * * *

(B) In contracts with contractors that have comprehensive subcontracting plans approved under the Test Program described in 219.702-70, including contracts using FAR part 12 procedures for

the acquisition of commercial items, use the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program), instead of the clauses at 252.219-7003, Small Business Subcontracting Plan (DoD Contracts), FAR 52.219-9, Small Business Subcontracting Plan, and FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

(2) In contracts with contractors that have comprehensive subcontracting plans approved under the Test Program described in 219.702-70, do not use the clause at FAR 52.219-16, Liquidated Damages-Subcontracting Plan.

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PART 242-CONTRACT ADMINISTRATION AND AUDIT SERVICES

6. Add subpart 242.15 to read as follows:

Subpart 242.15-Contractor Performance Information

Sec.

242.1502 Policy.

Subpart 242.15-Contractor Performance Information

242.1502 Policy.

(g) Past performance evaluations in the Contractor Performance Assessment Reporting System shall include an assessment of the contractor's performance against, and efforts to achieve, the goals identified in its comprehensive small business subcontracting plan when the contract contains the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program).

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

7. Amend section 252.219-7003 by—
 - a. Revising the section heading and introductory text;
 - b. Removing the clause date of "(MAR 2016)" and adding "(APR 2018)" in its place;
 - c. Adding paragraph (g); and
 - d. In Alternate I—
 - i. Revising the introductory text;
 - ii. Removing the clause date of "(MAR 2016)" and adding "(APR 2018)" in its place; and
 - iii. Adding paragraph (g).

The revision and additions read as follows:

252.219-7003 Small Business Subcontracting Plan (DoD Contracts) .

Basic. As prescribed in 219.708(b) (1) (A) and (b) (1) (A) (1), use the following clause:

* * * * *

(g) Include the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program), in subcontracts with subcontractors that participate in the Test Program described in DFARS 219.702-70, where the subcontract is expected to exceed \$700,000 (\$1.5 million for construction of any public facility) and to have further subcontracting opportunities.

* * * * *

Alternate I. As prescribed in 219.708(b) (1) (A) and (b) (1) (A) (2), use the following clause, which uses a different paragraph (f) than the basic clause.

* * * * *

(g) Include the clause at 252.219-7004, Small Business Subcontracting Plan (Test Program), in subcontracts with subcontractors that participate in the Test Program described in DFARS 219.702-70, where the subcontract is expected to exceed \$700,000 (\$1.5 million for construction of any public facility) and to have further subcontracting opportunities.

* * * * *

8. Revise section 252.219-7004 to read as follows:

252.219-7004 Small business subcontracting plan (Test Program).

As prescribed in 219.708(b) (1) (B), use the following clause:

SMALL BUSINESS SUBCONTRACTING PLAN (TEST PROGRAM) (APR 2018)

(a) Definitions. As used in this clause—

Covered small business concern means a small business concern, veteran-owned small business concern, service-disabled veteran-owned small business concern, HUBZone small business concern, women-owned small business concern, or small disadvantaged business concern, as these terms are defined in FAR 2.101.

Electronic Subcontracting Reporting System (eSRS) means the Governmentwide, electronic, Web-based system for small business

subcontracting program reporting. The eSRS is located at <http://www.esrs.gov>.

Failure to make a good faith effort to comply with a comprehensive subcontracting plan means a willful or intentional failure to perform in accordance with the requirements of the Contractor's approved comprehensive subcontracting plan or willful or intentional action to frustrate the plan.

Subcontract means any agreement (other than one involving an employer-employee relationship) entered into by a Federal Government prime Contractor or subcontractor calling for supplies or services required for performance of the contract or subcontract.

(b) Test Program. The Contractor's comprehensive small business subcontracting plan and its successors, which are authorized by and approved under the Test Program of 15 U.S.C. 637 note, as amended, shall be included in and made a part of this contract. Upon expulsion from the Test Program or expiration of the Test Program, the Contractor shall negotiate an individual subcontracting plan for all future contracts that meet the requirements of 15 U.S.C. 637(d).

(c) Eligibility requirements. To become and remain eligible to participate in the Test Program, a business concern is required to have furnished supplies or services (including construction) under

at least three DoD contracts during the preceding fiscal year, having an aggregate value of at least \$100 million.

(d) Reports. (1) The Contractor shall report semiannually for the 6-month periods ending March 31 and September 30, the information in paragraphs (d)(1)(i) through (v) of this section within 30 days after the end of the reporting period. Submit the report at <https://www.esrs.gov>.

(i) A list of contracts covered under its comprehensive small business subcontracting plan, to include the Commercial and Government Entity (CAGE) code and unique entity identifier.

(ii) The amount of first-tier subcontract dollars awarded during the 6-month period covered by the report to covered small business concerns, with the information set forth separately by—

(A) North American Industrial Classification System (NAICS) code;

(B) Major defense acquisition program, as defined in 10 U.S.C. 2430(a);

(C) Contract number, if the contract is for maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment, and the total value of the contract, including options, exceeds \$100 million; and

(D) Military department.

(iii) Total number of subcontracts active under the Test Program that would have otherwise required a subcontracting plan.

(iv) Costs incurred in negotiating, complying with, and reporting on its comprehensive subcontracting plan.

(v) Costs avoided through the use of a comprehensive subcontracting plan

(2) The Contractor shall—

(i) Ensure that subcontractors with subcontracting plans agree to submit an Individual Subcontract Report (ISR) and/or Summary Subcontract Report (SSR) using the Electronic Subcontracting Reporting System (eSRS).

(ii) Provide its contract number, its unique entity identifier, and the email address of the Contractor's official responsible for acknowledging or rejecting the ISR to all first-tier subcontractors, who will be required to submit ISRs, so they can enter this information into the eSRS when submitting their reports.

(iii) Require that each subcontractor with a subcontracting plan provide the prime contract number, its own unique entity identifier, and the email address of the subcontractor's official responsible for acknowledging or rejecting the ISRs to its subcontractors with subcontracting plans who will be required to submit ISRs.

(iv) Acknowledge receipt or reject all ISRs submitted by its subcontractors using eSRS.

(3) The Contractor shall submit SSRs using eSRS at <http://www.esrs.gov>. The reports shall provide information on subcontract awards to small business concerns, veteran-owned small business concerns, service-disabled veteran-owned small business concerns, HUBZone small business concerns, small disadvantaged business concerns, and women-owned small business concerns. Purchases from a corporation, company, or subdivision that is an affiliate of the prime Contractor or subcontractor are not included in these reports. Subcontract award data reported by prime contractors and subcontractors shall be limited to awards made to their immediate next-tier subcontractors. Credit cannot be taken for awards made to lower-tier subcontractors unless the Contractor or subcontractor has been designated to receive a small business or small disadvantaged business credit from a member firm of the Alaska Native-Corporations or an Indian tribe. Only subcontracts involving performance in the U.S. or its outlying areas should be included in these reports.

(i) This report may be submitted on a corporate, company, or subdivision (e.g., plant or division operating as a separate profit center) basis, as negotiated in the comprehensive subcontracting plan with the Defense Contract Management Agency.

(ii) This report encompasses all subcontracting under prime contracts and subcontracts with the Department of Defense, regardless of the dollar value of the subcontracts, and is based on the negotiated comprehensive subcontracting plan.

(iii) The report shall be submitted semiannually for the six months ending March 31 and the twelve months ending September 30. Reports are due 30 days after the close of each reporting period.

(iv) The authority to acknowledge receipt of or reject the SSR resides with the Defense Contract Management Agency.

(e) Failure to comply. The failure of the Contractor or subcontractor to comply in good faith with the clause of this contract entitled "Utilization of Small Business Concerns," or an approved plan required by this clause, shall be a material breach of the contract.

(f) Liquidated damages. The Contracting Officer designated to manage the comprehensive subcontracting plan will exercise the functions of the Contracting Officer, as identified in paragraphs (f)(1) through (4) of this clause, on behalf of all DoD departments and agencies that awarded contracts covered by the Contractor's comprehensive subcontracting plan.

(1) To determine the need for liquidated damages, the Contracting Officer will conduct a compliance review during the fiscal year after the close of the fiscal year for which the plan

is applicable. The Contracting Officer will compare the approved percentage or dollar goals to the total, actual subcontracting dollars covered by the plan.

(2) If the Contractor has failed to meet its approved subcontracting goal(s), the Contracting Officer will provide the Contractor written notice specifying the failure, advising of the potential for assessment of liquidated damages, and permitting the Contractor to demonstrate what good faith efforts have been made. The Contracting Officer may take the Contractor's failure to respond to the notice within 15 working days (or longer period at the Contracting Officer's discretion) as an admission that no valid explanation exists.

(3) If, after consideration of all relevant information, the Contracting Officer determines that the Contractor failed to make a good faith effort to comply with the comprehensive subcontracting plan, the Contracting Officer will issue a final decision to the Contractor to that effect and require the Contractor to pay liquidated damages to the Government in the amount identified in the comprehensive subcontracting plan.

(4) The Contractor shall have the right of appeal under the clause in this contract entitled "Disputes" from any final decision of the Contracting Officer.

(g) Subcontracts. The Contractor shall include in subcontracts that offer subcontracting opportunities, are expected to exceed

\$700,000 (\$1.5 million for construction of any public facility), and are required to include the clause at 52.219-8, Utilization of Small Business Concerns, the clauses at—

(1) FAR 52.219-9, Small Business Subcontracting Plan, and 252.219-7003, Small Business Subcontracting Plan (DoD Contracts)—Basic;

(2) FAR 52.219-9, Small Business Subcontracting Plan, with its Alternate III, and 252.219-7003, Small Business Subcontracting Plan (DoD Contracts)—Alternate I, to allow for submission of SF 294s in lieu of ISRs; or

(3) 252.219-7004, Small Business Subcontracting Plan (Test Program), in subcontracts with subcontractors that participate in the Test Program described in DFARS 219.702-70.

(End of clause)

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